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No.

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs.

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RESPONDENT JOHN A. PORTER'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S FINDING THAT PETITIONERS DID NOT HAVE STANDING TO APPEAL CREATES A CONFLICT WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST AND SEVENTH CIRCUITS.
2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT'S AFFIRMATION OF THE BANKRUPTCY COURT'S APPROVAL OF THE COMPROMISE BETWEEN THE TRUSTEE IN BANKRUPTCY AND THE ESTATE'S LARGEST CREDITOR CREATES A CONFLICT WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN TMT TRAILER FERRY, INC. V. ANDERSON, 390 U.S. 414 (1968) OR WITH THE DECISION OF ANY COURT OF APPEALS ON THIS ISSUE.
3. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AS TO WARRANT REVIEW BY THE UNITED STATES SUPREME COURT WHEN IT HELD THE BANKRUPTCY COURT ACTED WITHIN ITS DISCRETION WHEN IT APPROVED THE COMPROMISE OF THE ADVERSARY PROCEEDING BETWEEN THE TRUSTEE IN BANKRUPTCY AND THE ESTATE'S LARGEST CREDITOR.

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STATEMENT OF THE CASE

The Trustee in bankruptcy generally concurs with the Statement of the Case as set forth by the Petitioners. However, Petitioners' characterizations of the opinions below and the facts contain significant omissions and inaccuracies. This brief addresses those misstatements of fact.

The Bankruptcy Court approved the compromise of the adversary proceeding between Mr. Porter, the Trustee in bankruptcy, and the Soltows, the estate's largest creditor for the following reasons: Mr. Porter concluded the settlement was in the estate's best interest after he retained independent counsel to investigate the proposed settlement at great length (A.71); the Court agreed the settlement was reasonable (A.71); no creditors objected to the settlement (A.72); the "tremendous number of delays" caused by the Petitioners continuously drained funds from the estate which were destined for distribution to creditors (A.72); and lastly, because of the financial hardships imposed upon the Soltows by the Petitioners' delays (A.73). The Bankruptcy Court approved the compromise for all of the above reasons, not simply because it was a requirement of the settlement agreement (Petr. Br. 6).

Petitioners urge this Court to accept the assertion that the value of the 43 acres of land upon which Petitioners filed a lis pendens equals

$1.3-$1.5 million dollars. This statement omits that prior to instituting the compromised litigation, Petitioners attempted to sell this property at a price exceeding the mortgage of $610,446.14. For a period exceeding two and a half years, this effort was unsuccessful. (A.23; A.189-193). Petitioner's value assessment is clearly suspect considering the true fair market value of property is the price at which a willing buyer agrees to purchase it from a willing seller, and Petitioners found no willing buyer.

Petitioners claim the promissory notes underlying the mortgage were "usury infected" (Petr. Br. 8-9). Further, they claim Michigan law authorized the filing of the lis pendens on Mr. Soltow's property with the result that the Soltow's claim was meritless (Petr. Br. 9). Both statements fail to mention the merits of these positions were extensively and independently researched by Mr. Porter's counsel (A.148). Rather than finding support for the Petitioners' claims, Mr. Porter's counsel concluded that when weighed against the costs of litigation, the usury claim would not result in a favorable monetary outcome to the estate. The research also revealed the Soltow's counterclaim contained sufficient merit to warrant a compromise (A.16). In addition, Petitioners' statement of the case does not acknowledge Mr. Porter's formal examination of Petitioner Richard Fishell, under Fed. R. Bankr. P. 2004, for the purpose of determining the strength

of his claims and their likelihood of success nor does it acknowledge that as a result of the examination, Mr. Porter concluded Petitioner's claims lacked sufficient merit to achieve success in the adversary proceeding (A.63).

Petitioners imply the Bankruptcy Court based its approval of the compromise between Mr. Porter and the Soltows on one hour-long hearing (Petr. Br. 10). In reality, the Bankruptcy Court conducted a pre-trial of the adversary proceeding, ruled on a motion for jury trial, read and ruled on motions for summary judgment, was present for the examination of the Petitioner, considered briefs with regard to the compromise, and disposed of, in the words of the court, "every motion that almost is imaginable" (A.158-160). It is on this foundation, in addition to arguments of counsel, upon which the court rested its decision.

Petitioners insinuate the court favored Respondents in the approval hearing of July 10, 1992 (Petr. Br. 10). The record, however, reflects the Bankruptcy Court's apportionment of argument time stemmed from a desire for a fair balance between the two parties and the Petitioners rather than a predisposition against Petitioners (A.109).

Petitioners contend that Mr. Porter and the Soltows submitted no witnesses, failed to analyze the law relating to the opposing claims of the

adversary proceeding and did not submit findings of fact or conclusions of law (Petr. Br. 11). Petitioners fail to recognize the independent and extensive research conducted by Mr. Porter's counsel, the voluminous material examined by the Bankruptcy Court, Mr. Porter's examination of Petitioner Richard Fishell, the estate's key witness in the adversary proceeding, and the extensive analysis of the issues conducted by the Soltows as parties to the adversary proceeding. (A.71; A.158-160; A.63; A.116).

Petitioners note the Bankruptcy Court did not read the brief in opposition to the compromise they filed on July 10, 1992 (Petr. Br. 11-12). They fail to note the filing was not timely, and Petitioners' counsel briefed the court on its contents during oral arguments (A.144-145).

Petitioners assert Mr. Porter's arguments in Bankruptcy Court were speculative (Petr. Br. 12). However, Petitioners fail to appreciate that when compromising an adversary proceeding and weighing the advantages and disadvantages of litigation, a Trustee, such as Mr. Porter, and the court must rely upon the experience of those involved in the bankruptcy process. The weight given to the judgments of bankruptcy experts such as Mr. Porter's counsel, and experienced Trustees, such as Mr. Porter, as to the merits of litigation is justifiably significant and not mere speculation.

Finally, Petitioners state the Bankruptcy Court failed to take into account the merits of Petitioners' cause of action in the adversary proceeding and failed to elaborate on its reasons for approving the compromise (Petr. Br. 12-14). On the contrary, the Bankruptcy Court specifically referred to its familiarity with the legal issues involved in the adversary proceeding (A.160). The court mentioned it was familiar with the state court proceedings, the pre-trial conducted in Bankruptcy Court, the independent investigation of the facts and issues surrounding the case, the motions for summary judgment, the motion for a jury trial and the subsequent appeal, the oral arguments of counsel and the briefs supporting and opposing the compromise (A.67; A.70; A.71; A.145; A.159-160). That the Bankruptcy Judge referred to his familiarity with this mass of information evinces the Bankruptcy Court both understood the issues and identified which portions of the record supported approval of the compromise.

SUMMARY OF THE ARGUMENT

In its decision below, the United States Court of Appeals for the Sixth Circuit applied the First Circuit rule regarding standing to appeal in Bankruptcy Court. The rule holds that the right to appellate review is limited to those persons whose rights and interests are affected by the proceedings. Generally, debtors in Chapter 7 proceedings have no standing

because their position is now represented by the Trustee. There is however, an exception for those debtors who show the estate has assets that exceed liabilities. The Seventh Circuit utilizes the same rule. Because the First, Sixth, and Seventh Circuits all employ the same rule regarding appellate standing in Bankruptcy Court, there is no conflict that would justify granting the Petition for Writ of Certiorari.

In its decision below, the Court of Appeals for the Sixth Circuit applied the standard set forth by this Court for review of a Bankruptcy Court's approval of a compromise. That standard requires the Bankruptcy Court to make an "informed, independent" judgment that the compromise is fair and equitable. Furthermore, the Bankruptcy Court must apprise itself of all the facts necessary for an intelligent and objective opinion. The cases Petitioner cites as being in conflict with the Sixth Circuit's decision all adhere to this standard. Therefore, because the Sixth Circuit and the other Circuit decisions cited by Petitioner all adhere to the standards set forth by this Court, there is no conflict among the circuits or between this Court and the decision below. Thus, there is no conflict that would justify granting the Petition for Writ of Certiorari.

In its decision below, the Court of Appeals for the Sixth Circuit applied the appropriate standard set forth by this Court when it reviewed the Bankruptcy Court's approval of a compromise between the Trustee and

the Soltows. It applied that standard correctly as evidenced by the abundance of material it demonstrated the Bankruptcy Court considered in making its decision. As a result, the Court of Appeals did not depart from the accepted and usual course of judicial proceedings or sanction such a departure by the Courts below.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS IN EITHER THE FIRST OR SEVENTH CIRCUIT WHICH ADDRESS DEBTOR STANDING.[1]

In the instant case, the Court of Appeals cites the rule and exceptions regarding standing to appeal in bankruptcy litigation established in In re El San Juan Hotel, 809 F.2d 151 (1st Cir. 1987). In adjudicating whether a former trustee had standing to appeal a bankruptcy court order,

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[1] Should this Court rule in favor of Petitioners with regard to the standing issue, there still remains the decisions of both the District Court and Court of Appeals on the underlying issue of whether the Bankruptcy Court abused its discretion in approving the compromise. Both courts found the Bankruptcy Court did not abuse its discretion in approving the proposed settlement after ruling Petitioners did not have standing to appeal. Significantly, the Bankruptcy Court did not deny Petitioners' standing to oppose the compromise and be heard when it considered the compromise. Thus, even if the District Court and Court of Appeals erred in holding the Petitioners lacked standing, it would be harmless error under the circumstances of this case.

the court recited the general rule and exceptions regarding standing to appeal in bankruptcy litigation:

> [T]he right of appellate review in bankruptcy proceedings has historically been limited to "persons aggrieved," *i.e.*, to those persons whose rights or interests are "directly and adversely affected pecuniarily" by the order or decree of the bankruptcy court . . .
>
> The evolution of the appellate standing principles, and the application of this qualifying formula, focused primarily on the bankrupt or trustee as appellant. Ordinarily under the Bankruptcy Act, . . . a bankrupt was not found to be a "person aggrieved" because adjudication absolved the bankrupt of liability and he had no interest in the distribution of property of the estate since the bankrupt's property had passed to the trustee by virtue of the Bankruptcy Act. Thus, a hopelessly insolvent debtor does not have standing to appeal orders affecting the size of the estate since such an order would not diminish the debtor's property, increase his burdens, or detrimentally affect his rights.

Id. (citing in part In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983)).

> The court noted two exceptions to this rule:
>
> 1) if a successful appeal by the debtor would create an estate that has assets in excess of liabilities, . . . and 2) an appeal taken from orders that affect the terms, conditions and extent of a debtors discharge. . . .

Id. at 155. As stated above, the Court of Appeals specifically relied upon this rule and these exceptions in its opinion when affirming the District Court's decision. The Seventh Circuit employs the same rule.

Petitioners cite In re Andreuccetti, 975 F.2d 413 (7th Cir. 1992) as evidence the Court of Appeals for the Sixth Circuit wielded a different standard when finding Petitioners lacked standing. However, the Seventh Circuit actually cited the same passage as did the Sixth Circuit:

> As we have recently noted:
>
> > In order to appeal a bankruptcy court's order, a litigant must qualify as a "person aggrieved" by the order. In re El San Juan Hotel, 809 F.2d 151, 154 (1st Cir. 1987). A "person aggrieved" by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens, or impairs the person's rights. See In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983).

Id. at 416. Thus, the fact that both the Sixth Circuit in the instant case and the Seventh Circuit in In re Andreuccetti employed the same rule found in In re El San Juan Hotel reveals there is no conflict between the Sixth, Seventh and First Circuits with regard to standing to appeal in bankruptcy litigation.[2] Rather, Petitioners object to the findings of the courts below pursuant to this standard. Both the District Court and the Court of Appeals found Petitioners presented insufficient evidence to warrant application of the exception to the general rule that they lacked standing.

In sum, there is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit below and the decision of the

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[2] The other authorities Petitioners cite relate to creditors and are inapplicable.

Seventh Circuit in In re Andreuccetti or the decision of the First Circuit in In re El San Juan Hotel. Therefore, pursuant to Supreme Court Rule 10.1(a), there is no basis for which to grant the Petition for Writ of Certiorari in order to resolve conflicts regarding standing to appeal in bankruptcy litigation.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH EITHER DECISIONS OF THE UNITED STATES SUPREME COURT OR DECISIONS OF THE OTHER CIRCUITS WITH REGARD TO THE STANDARD BANKRUPTCY COURTS MUST USE WHEN APPROVING COMPROMISES.

The United States Court of Appeals for the Sixth Circuit applied the standard established in Protective Committee for Shareholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968) when reviewing the Bankruptcy Court's approval of the compromise between Mr. Porter, the Trustee in bankruptcy, and the Soltows. In TMT Trailer Ferry, Inc., the United States Supreme Court held:

> [I]t is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court . . . The requirements of [the Bankruptcy Act], that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations . . .

> There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.

Id. at 424. The Court of Appeals for the Sixth Circuit applied the standard established above to the instant case.

The Court of Appeals demonstrated it was conversant with the applicable standard when it stated:

> In analyzing a settlement, "the court is obligated to weigh all conflicting interests in deciding whether the compromise is 'fair and equitable,' considering such factors as the probability of success on the merits, the complexity and expense of litigation, and the reasonable views of creditors" . . . In essence, the bankruptcy court must make an independent judgment that a proposed settlement is fair and equitable.

(A.31, citing Bauer v. Commerce Union Bank, 859 F.2d 438, 441 (6th Cir. 1988), cert. denied 489 U.S. 1079 (1989). Thus, it is evident the Court of Appeals used the standard set forth in TMT Trailer Ferry, Inc. when it affirmed the lower court rulings in regard to the Trustee-Soltow compromise.

Petitioners allege the Sixth Circuit's decision utilizes a standard for reviewing compromise agreements different from that of other circuits.[3] A review of the circuit decisions which Petitioners cite in support of this position reveals no such conflict exists. The court in each of the following cases reiterates the standard outlined in TMT Trailer Ferry, Inc. when it details the duties of the Bankruptcy Court when considering approval of a compromise settlement: In re Walsh Construction, Inc., 669 F.2d 1325, 1328 (9th Cir. 1982); Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977); In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 212 (5th Cir. 1981); Plummer v. Chemical Bank, 668 F.2d 654, 659 (2nd Cir. 1982); In re Boston and Providence Railroad, 673 F.2d 11, 12 (1st Cir. 1982); In re Jackson Brewing Company, 624 F.2d 605, 612 (5th Cir. 1980); and Matter of AWECO, Inc., 725 F.2d 293, 298 (5th Cir. 1984). Thus, because the Sixth Circuit decision in the present matter strictly complied with the standard set forth in TMT Trailer Ferry, Inc. for approval of compromises in bankruptcy proceedings and the Circuit Court decisions

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[3] The Petitioners' brief asserts a conflict among the 6th, 7th and 9th Circuits in its Questions Presented, but later claims a conflict exists with the 5th Circuit as well. As a result of this incongruity, this brief will address all the relevant cases Petitioners cite.

cited by Petitioners also utilize the same standard, there is no conflict among the circuits.

It is also relevant that Petitioners exclude from the applicable law the pertinent portion of In re A & C Properties, 784 F.2d 1377 (9th Cir. 1986), cert. denied 479 U.S. 854 (1986). There, in a situation similar to the instant case, the court found the findings of fact to be sufficient:

> In our case, the bankruptcy court's findings of fact and conclusions of law are rather general. However, the bankruptcy court attached to these findings and conclusions a copy of the settlement agreement upon which it relied, and which it approved. . . Appellate review is made more difficult by the lower court's failure to write an opinion explaining why it deemed the compromise to be fair, reasonable and adequate. . . However, where the record supports approval of the compromise, the bankruptcy court should be affirmed. . .
>
> It is clear from the record before us, which is well over four thousand pages with reporter's transcripts amounting to nearly one thousand pages, that the bankruptcy judge was informed and had apprised himself of all facts necessary to make an intelligent and independent judgment that the compromise was fair and equitable.

Id. at 1382. It is this Circuit Court decision that is the most applicable to the instant case and it is clearly not in conflict with the decisions below.

In sum, there is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit and "the decision of another United States Court of Appeals on the same matter," or any decision of the

United States Supreme Court. Supreme Court Rule 10.1(a);(c). Therefore, there is no basis for which to grant the Petition for Writ of Certiorari in order to resolve conflicts involving the standards a Bankruptcy Court must follow in order to approve a compromise.

III. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY APPLIED THE STANDARDS SET FORTH IN TMT TRAILER FERRY, INC., WHICH DETAILED THE DUTIES OF THE BANKRUPTCY COURT WHEN CONSIDERING APPROVAL OF A COMPROMISE, TO THE BANKRUPTCY COURT'S DECISION BELOW AND DID NOT SANCTION A DEPARTURE FROM THOSE STANDARDS BY THE COURTS BELOW.

It is evident from the Sixth Circuit's opinion below that the court not only based its affirmation upon the correct standard, but that there was ample reason to do so. Again, the relevant holding in TMT Trailer Ferry, Inc. requires compliance with the following:

> [I]t is essential that every important determination in reorganization proceedings receive the 'informed, independent judgment' of the bankruptcy court . . . The requirements of [t.e Bankruptcy Act], that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations . . . There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated.

Id. at 424. Therefore, the crux of the issue is whether the Court, in reviewing whether the Bankruptcy Court abused its discretion, properly held the Bankruptcy Court to the correct standard.

As evidenced above (pages 7-9), the Court of Appeals did review the Bankruptcy Court's approval of the compromise in light of the standards set forth in TMT Trailer Ferry, Inc. Its review concluded the Bankruptcy Court did not abuse its discretion. The Court of Appeals proceeded to list the many factors the Bankruptcy Court identified in its findings showing it approved the settlement between the Trustee, Mr. Porter, and the Soltows:

> [T]he record before [this] court clearly supports the approval of the compromise. The Bankruptcy Court had before it the record developed in the state court proceeding, as well as the extensive record developed before the bankruptcy court itself. The Bankruptcy Court held several hearings and decided several motions related to the instant proceeding. These included motions for summary judgment and a formal Rule 2004 examination of Richard Fishell. Accordingly, the Bankruptcy Court possessed a good deal of information and knowledge about the dispute between the Fishells and the Soltows and how that dispute affected the Fishells' other creditors.

(A.15). Here, the Court of Appeals provides the reasons why the Bankruptcy Court's approval of the compromise satisfies the requirement that the judge "apprise himself of the relevant facts and law so that he can

make an informed and intelligent decision, and set out the reasons for that decision" (A.13).[4]

Therefore, the Court of Appeals for the Sixth Circuit correctly applied the applicable standard for review of a Bankruptcy Court's approval of a compromise. The court also outlined the reasons why the Bankruptcy Court satisfied those requirements and thus did not "depart from the accepted and usual course of judicial proceedings" or "sanction such a departure by a lower court." Supreme Court Rule 10.1(a). For that reason, there is no basis on which to grant the Petition for Writ of Certiorari in order to exercise this Court's power of supervision.

CONCLUSION

There is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit below and any of this Court's decisions or the decisions of any other United States Court of Appeals. Similarly, the court below did not depart from the accepted and usual course of judicial

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[4] Careful review of the Bankruptcy Court proceedings reveals the court's findings do in fact mention the numerous facts upon which it based its decision; the Court of Appeals is nevertheless correct in citing In re A&C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986), cert. denied 479 U.S. 854 (1986), which states it is sufficient for the Bankruptcy Court's record to contain adequate facts with which to make an informed decision.

proceedings or sanction such a departure by a lower court. Mr. Porter, the Trustee in bankruptcy, asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Dated: July 25, 1995

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